

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

HANSEN BEVERAGE COMPANY, a
Delaware corporation,

Plaintiff,

vs.

INNOVATION VENTURES, LLC dba
LIVING ESSENTIALS, a Michigan
corporation,

Defendant.

CASE NO. 08-CV-1166-IEG (POR)

**ORDER GRANTING IN PART
AND DENYING IN PART
PLAINTIFF'S MOTION TO
DISMISS DEFENDANT'S
AMENDED COUNTERCLAIM**

[Doc. No. 136]

Presently before the Court is Plaintiff Hansen Beverage Company's ("Hansen") motion to dismiss Defendant Innovation Ventures, LLC dba Living Essentials' ("Living Essentials") amended counterclaim. (Doc. No. 136.) Living Essentials filed an opposition, and Hansen filed a reply. The Court heard oral argument on December 14, 2009. For the reasons stated herein, the Court grants in part and denies in part the motion to dismiss.

BACKGROUND

This case involves two competing companies that produce energy drinks. Living Essentials produces a two-ounce "energy shot" under the 5-Hour Energy brand name. Hansen produces a number of products under the brand names Hansen, Monster, and Lost.

On July 1, 2008, Hansen filed a complaint against Living Essentials for false advertising in violation of the Lanham Act, as well as unfair competition, false advertising, and trade libel in

1 violation of California law. (Doc. No. 1.) On August 18, 2008, Living Essentials filed an answer.

2 On August 11, 2009, the Court granted Hansen's motion for leave to file a first amended
 3 complaint asserting the same three causes of action, and docketed the proposed First Amended
 4 Complaint attached to the motion. (Doc. No. 96.) On August 27, 2009, Living Essentials filed an
 5 answer to the First Amended Complaint and asserted a counterclaim against Hansen. (Doc. No.
 6 38.) The counterclaim set forth two causes of action: (1) false advertising in violation of the
 7 Lanham Act, and (2) unfair competition in violation of California Business and Professions Code §
 8 17200 and false advertising in violation of § 17500.

9 On September 16, 2009, Hansen filed a motion to dismiss the counterclaim or,
 10 alternatively, to sever. (Doc. No. 111.) Subsequently, on October 12, 2009, Living Essentials
 11 filed an amended counterclaim asserting the same two causes of action. (Doc. No. 128.)

12 On October 26, 2009, Hansen withdrew the original motion to dismiss the counterclaim or,
 13 alternatively, to sever, and filed the instant motion to dismiss. (Doc. No. 136.)

14 **DISCUSSION**

15 I. **Legal Standard**

16 A complaint must contain "a short and plain statement of the claim showing that the
 17 pleader is entitled to relief." Fed. R. Civ. P. 8(a) (2009). A motion to dismiss pursuant to Rule
 18 12(b)(6) of the Federal Rules of Civil Procedure tests the legal sufficiency of the claims asserted in
 19 the complaint. Fed. R. Civ. P. 12(b)(6); Navarro v. Block, 250 F.3d 729, 731 (9th Cir. 2001). The
 20 court must accept all factual allegations pled in the complaint as true, and must construe them and
 21 draw all reasonable inferences from them in favor of the nonmoving party. Cahill v. Liberty
 22 Mutual Ins. Co., 80 F.3d 336, 337-38 (9th Cir.1996).

23 To avoid a Rule 12(b)(6) dismissal, a complaint need not contain detailed factual
 24 allegations, rather, it must plead "enough facts to state a claim to relief that is plausible on its
 25 face." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007). A claim has "facial plausibility
 26 when the plaintiff pleads factual content that allows the court to draw the reasonable inference that
 27 the defendant is liable for the misconduct alleged." Ashcroft v. Iqbal, --- U.S. ---, 129 S.Ct. 1937,
 28 1939 (2009) (citing Twombly, 550 U.S. at 556). "The plausibility standard is not akin to a

1 ‘probability requirement,’ but it asks for more than a sheer possibility that a defendant has acted
 2 unlawfully.” Iqbal, 129 S.Ct. at 1949 (citing Twombly, 550 U.S. at 556).

3 However, “a plaintiff’s obligation to provide the ‘grounds’ of his ‘entitle[ment] to relief’
 4 requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of
 5 action will not do.” Id. at 555 (citation omitted). “Factual allegations must be enough to raise a
 6 right to relief above the speculative level, on the assumption that all the allegations in the
 7 complaint are true (even if doubtful in fact).” Id. (citation omitted). In spite of the deference the
 8 court is bound to pay to the plaintiff’s allegations, it is not proper for the court to assume that “the
 9 [plaintiff] can prove facts that [he or she] has not alleged or that defendants have violated the . . .
 10 laws in ways that have not been alleged.” Associated Gen. Contractors of Cal., Inc. v. Cal. State
 11 Council of Carpenters, 459 U.S. 519, 526, (1983). Also, the court need not accept “legal
 12 conclusions” as true. Iqbal, 129 S.Ct. at 1949.

13 II. Request for Judicial Notice

14 Hansen attaches to its reply brief a request for judicial notice of several documents: (1) an
 15 excerpt from the deposition transcript of Manoj Bhargava, Living Essentials’ Chief Executive,
 16 taken November 18, 2009; (2) FDA materials from the FDA website; and (3) the declaration of
 17 Leslie T. Krasny, an expert in food law.

18 In ruling on a motion to dismiss for failure to state a claim, “a court may generally consider
 19 only allegations contained in the pleadings, exhibits attached to the complaint, and matters
 20 properly subject to judicial notice.” Swartz v. KPMG LLP, 476 F.3d 756, 763 (9th Cir. 2007). A
 21 court may take judicial notice of facts not subject to reasonable dispute and either “generally
 22 known” in the court’s territorial jurisdiction, or “capable of accurate and ready determination” by
 23 reference to sources whose accuracy cannot reasonably be questioned. Fed. R. Evid. 201 (2009).

24 Information on government agency websites has often been treated as properly subject to
 25 judicial notice.” Paralyzed Veterans of Am. v. McPherson, 2008 U.S. Dist. LEXIS 69542, at *5
 26 (N.D. Cal. Sept. 8, 2008); see also United States ex rel. Dingle v. BioPort Corp., 270 F. Supp. 2d
 27 968, 972 (W.D. Mich. 2003) (“Public records and government documents are generally considered
 28 ‘not to be subject to reasonable dispute.’ This includes public records and government documents

1 available from reliable sources on the Internet.”) (citing Jackson v. City of Columbus, 194 F.3d
 2 737, 745 (6th Cir. 1999)).

3 The Court denies Hansen’s request for judicial notice as to the deposition transcript of
 4 Manoj Bhargava and the declaration of Leslie T. Krasny, as these are not matters properly subject
 5 to judicial notice. However, the documents Hansen has submitted from the FDA website are
 6 properly subject to judicial notice under Federal Rule of Evidence 201, and the Court grants
 7 Hansen’s request as to these documents only.

8 **III. Analysis**

9 Hansen argues Living Essentials’ counterclaim should be dismissed for six reasons: (1)
 10 Living Essentials does not have standing to privately enforce the Federal Food, Drug, and
 11 Cosmetic Act (“FDCA”) and Federal Food and Drug Administration (“FDA”) regulations through
 12 its Lanham Act claim; (2) the FDCA preempts the state law claims; (3) Living Essentials fails to
 13 adequately plead standing under the Lanham Act; (4) Living Essentials fails to adequately plead
 14 standing under its state law causes of action; (5) the counterclaim sounds in fraud and does not
 15 meet Rule 9(b)’s heightened pleading requirements; and (6) Hansen’s representations about its
 16 products are non-actionable puffery. The Court addresses each argument in turn.

17 **A. Standing to Enforce the FDCA**

18 Hansen’s first argument is that Living Essentials does not have standing to bring the
 19 Lanham Act claim because it is a backdoor attempt to enforce the FDCA or FDA regulations
 20 through private action. The issue is whether Living Essentials’ Lanham Act claim constitutes
 21 private enforcement of the FDCA.

22 **1. Overview of Living Essentials’ Lanham Act Claim**

23 Living Essentials alleges in its first cause of action that Hansen’s advertising contains false
 24 and misleading statements of fact about Hansen’s energy products in violation of Section 43(a) of
 25 the Lanham Act, 15 U.S.C. § 1125(a) (2009). Section 43(a) of the Lanham Act provides a private
 26 cause of action for “any person who believes he or she is likely to be damaged” by the use in
 27 commerce of “any false designation of origin, false or misleading description of fact, or false or
 28

1 misleading representation of fact" in connection with any goods or services.¹ Id. The Lanham Act
 2 is "primarily intended to protect commercial interests" and "provides a private remedy to a
 3 commercial plaintiff who meets the burden of proving that its commercial interests have been
 4 harmed by a competitor's false advertising." Sandoz Pharm. Corp. v. Richardson-Vicks, Inc., 902
 5 F.2d 222, 230 (3rd Cir. 1990).

6 Living Essentials' Lanham Act claim is based on Hansen's allegedly false and misleading
 7 advertising and labeling of Hansen's products. Living Essentials alleges Hansen's statements: (1)
 8 promote Hansen's energy products as a means to get intoxicated; (2) mislead as to calorie and
 9 sugar content; (3) mislead as to energizing effect; and (4) misbrand Hansen's products as dietary
 10 supplements.

11 The original counterclaim alleged Hansen violated certain FDCA provisions. After
 12 Hansen's original motion to dismiss raised the argument that Living Essentials was attempting to
 13 enforce the FDCA, Living Essentials amended its counterclaim by deleting most references to the
 14 FDCA and substituting provisions of the California Food, Drug, and Cosmetic Law ("Sherman
 15 Law"), codified at California Health & Safety Code §§ 109875-111915 (2009). The Sherman Law
 16 contains some identical provisions to the FDCA. See In re Farm Raised Salmon Cases, 72 Cal.
 17 Rptr. 3d 112, 118-19 (2008).

18 2. Overview of the FDCA

19 The FDCA gives the FDA the responsibility to promulgate regulations to ensure that
 20 "foods are safe, wholesome, sanitary, and properly labeled." 21 U.S.C. § 393(b)(2)(A). By
 21 contrast to the Lanham Act, the FDCA is "not focused on the truth or falsity of advertising
 22 claims." Sandoz Pharm. Corp. v. Richardson-Vicks, Inc., 902 F.2d 222, 230 (3rd Cir.1990).

23
 24 ¹The elements of a Lanham Act § 43(a) false advertising claim are: "(1) a false statement of
 25 fact by the defendant in a commercial advertisement about its own or another's product; (2) the
 26 statement actually deceived or has the tendency to deceive a substantial segment of its audience; (3)
 27 the deception is material, in that it is likely to influence the purchasing decision; (4) the defendant
 28 caused its false statement to enter interstate commerce; and (5) the plaintiff has been or is likely to be
 injured as a result of the false statement, either by direct diversion of sales from itself to defendant or
 by a lessening of the goodwill associated with its products." Southland Sod Farms v. Stover Seed Co.,
 108 F.3d 1134, 1139 (9th Cir. 1997). To demonstrate falsity, a plaintiff must show either: (1) the
 challenged advertisement is literally false, either on its face or by necessary implication of a false
 statement; or (2) while the advertisement is literally true, it is nevertheless likely to mislead or confuse
 consumers. Id.

1 The FDCA does not provide for a private cause of action. See, e.g., Summit Tech., Inc. v.
 2 High-Line Med. Instruments Co., 922 F. Supp. 299, 305 (C.D. Cal. 1996); Braintree Labs., Inc. v.
 3 Nephro-Tech, Inc., 1997 WL 94237 at *6 (D. Kan. Feb. 26, 1997) (“[E]very federal court that has
 4 addressed the question has held that the FDCA does not create a private right action to enforce or
 5 restrain violations of its provisions.”). The standing provision in Section 337(a) states: “Except as
 6 provided under subsection (b) of this section, all such proceedings for the enforcement, or to
 7 restrain violations, of [the Act] shall be by and in the name of the United States” 21 U.S.C. §
 8 337(a). The FDA has responsibility for enforcing the FDCA and its regulations.² 21 C.F.R. § 7.1
 9 (2009).

10 3. General Principles of FDCA Preclusion

11 Several cases have addressed the issue of whether Section 337 bars plaintiffs from
 12 asserting a claim for violation of the Lanham Act that implicates the FDCA or FDA regulations.
 13 The following general principles have emerged from the caselaw.

14 First, a Lanham Act claim requiring interpretation and enforcement of FDA regulations is
 15 not properly decided as an original matter by the district court. Sandoz, 902 F.2d at 232;
 16 Braintree, 1997 WL 94237 at *6 (“A plaintiff may not use the Lanham Act as an alternative
 17 vehicle by which to seek redress for an FDCA violation.”). “Application of this rule invariably
 18 occurs when the FDA has failed to take a position on the particular issue that is the subject of the
 19 alleged false representation comprising the Lanham Act claim.” Mutual Pharm. Co. v. Ivax
 20 Pharm. Inc., 459 F. Supp. 2d 925, 934 (C.D. Cal. 2006).

21 For example, in Sandoz, the plaintiff sued Vicks for violation of the Lanham Act and for
 22 common law unfair competition, alleging Vicks labeled the demulcent in its cough syrup as an
 23 “inactive” ingredient. 902 F.2d at 230. Plaintiff argued that demulcents fell within the FDA’s
 24 definition of an “active” ingredient. Id. But the Third Circuit held that because the FDA had not
 25 yet determined whether its definition of the term “active” applied to demulcents, the claim was

27 ²Section 337(b) carves out an exception for States to enforce certain sections of the FDCA,
 28 provided they give the federal government 30 days notice and the opportunity to commence its own
 superceding enforcement action. 21 U.S.C. § 337(b)(1).

1 precluded. Hearing the case would force the court “to usurp an administrative agency’s
 2 responsibility for interpreting and enforcing potentially ambiguous regulations.” Id. at 231.

3 Similarly, in Summit Technology, Inc. v. High-Line Medical Instruments Co., the district
 4 court held that plaintiff’s Lanham Act and state unfair competition claims were precluded. 922 F.
 5 Supp. 299 (C.D. Cal. 1996) (Summit I). Plaintiff alleged defendants failed to disclose the fact that
 6 the re-imported laser systems defendants were advertising had not been approved by the FDA for
 7 use in the United States. However, the court noted that the FDA had not yet determined whether
 8 or not the systems needed further FDA approval at all. Id. at 306. Thus, the claim would require
 9 the court to “determine preemptively how a federal agency will interpret and enforce its own
 10 regulations.” Id.

11 “On the other hand, once the FDA has taken a position on a particular matter, courts have
 12 consistently allowed the Lanham Act claim to proceed even if in determining the falsity of the
 13 alleged representation the court must make reference to the FDA action.” Mutual Pharm., 459 F.
 14 Supp. 2d 925, 934-35. Courts have held that affirmative misrepresentations are “generally
 15 actionable under the Lanham Act, even if the product is regulated by the FDA.” Braintree, 1997
 16 WL 94237 at *6 (citing Grove Fresh Distrib., Inc. v. Flavor Fresh Foods, Inc., 720 F. Supp. 714
 17 (N.D. Ill. 1989) and Mylan Labs., Inc. v. Matkari et al., 7 F.3d 1130 (4th Cir. 1993)); Summit
 18 Tech., Inc. v. High-Line Med. Instruments, Co., 933 F. Supp. 918, 933 (C.D. Cal. 1996) (“Summit
 19 II”) (“[F]alse statements are actionable under the Lanham Act, even if their truth may be generally
 20 within the purview of the FDA.”).

21 For example, in Grove Fresh, plaintiff sued a food manufacturer for Lanham Act and state
 22 unfair competition violations, for representing its product as 100% orange juice, although the juice
 23 contained various additives and adulterants. 720 F. Supp. at 714-15. The defendant argued that
 24 the “sole thrust” of the allegation was that it violated an FDA regulation establishing a specific
 25 definition of the term “orange juice from concentrate.” Id. at 715. The court held that nothing
 26 prohibited Grove Fresh from relying on the FDA regulation “merely to establish the standard or
 27 duty which defendants allegedly failed to meet.” Id. at 715-16. Even without the FDA
 28

1 regulation, the court held that Grove Fresh could establish a violation by providing other evidence
 2 establishing the proper market definition of “orange juice from concentrate.” Id. at 715.

3 Similarly, in Mylan Laboratories, Inc. v. Matkari et al., the Fourth Circuit held plaintiff’s
 4 Lanham Act claim was not precluded, where plaintiff alleged that generic drug manufacturers
 5 falsely represented the drugs were “bioequivalent” to plaintiff’s drugs. 7 F.3d 1130, 1137-38. (4th
 6 Cir. 1993). Even though the FDA defined the term “bioequivalence,” the court held that Mylan set
 7 forth sufficiently particularized allegations of false or misleading representations regarding
 8 “bioequivalence” to sustain a claim. Id. at 1138. On the other hand, the court found Mylan’s other
 9 claim failed, where plaintiff alleged that by the very act of placing the drug on the market,
 10 defendants falsely represented that their drugs had been properly approved by the FDA. Id. at
 11 1139. The court held that permitting Mylan to proceed on this theory “would, in effect, permit
 12 Mylan to use the Lanham Act as a vehicle by which to enforce the [FDCA and its regulations].”
 13 Id. Rather, plaintiff was required to point to some affirmative misrepresentation. Id.

14 From these precedents, the general principle emerges that “[i]f the allegedly false or
 15 misleading nature of a statement can be easily verified, then the fact that the determination of the
 16 truth of that statement was made by the FDA is immaterial so long as the party can also show the
 17 other requirements for establishing a Lanham Act claim, that is, that the false or misleading
 18 statement is likely to deceive consumers.” Mutual Pharm., 459 F. Supp. 2d at 935 (holding
 19 plaintiff’s claim was not precluded where plaintiff alleged the defendant’s drug labeling gave the
 20 false impression the drug was FDA-approved, but FDA had already determined what needed to be
 21 on the label and plaintiff simply argued that defendant’s label did not conform).

22 4. Hansen’s Allegedly False and Misleading Statements

23 Hansen argues that Living Essentials’ Lanham Act claim would require the Court either to
 24 determine preemptively how the FDA would rule on certain issues or contradict established FDCA
 25 precedent. Living Essentials argues that the heart of its claims is that Hansen’s advertising is false
 26 and misleading irrespective of the FDCA or Sherman Law. The Court addresses each allegedly
 27 false or misleading statement separately.

28 //

1
2 a. Alleged promotion of energy products as a means to get
3 intoxicated

4 Living Essentials alleges “Hansen misleads consumers through its marketing into believing
5 that it is safe to mix its caffeinated products with alcohol or for young children to consume [excess
6 caffeine].” (FAC ¶ 18.)

7 Living Essentials contends Hansen promotes Hansen energy products to youths for use in
8 “partying” and “as a means to achieve intoxication.” (FAC ¶ 20.) For example, Hansen allegedly
9 posts alcoholic drink recipes on its website, targets youths by sponsoring young athletes at sports
10 events, and promotes at college campuses, bars, and nightclubs. (FAC ¶¶ 21-25.) According to
11 Living Essentials, mixing caffeinated products with alcohol is dangerous because it leads people to
12 drink more and engage in dangerous activities, and furthermore, mixing Hansen’s products is
13 particularly dangerous because Hansen does not disclose the content of caffeine or guarana in its
14 products. (FAC ¶¶ 26-30.)

15 Living Essentials alleges violations of the Sherman Law. First, Hansen’s products are
16 allegedly “adulterated” because they “present an unreasonable risk of illness or injury when used
17 as directed or marketed.”³ (FAC ¶ 17.) According to Living Essentials, the California Department
18 of Health Services has not approved the use of energy products as “food additives” to alcohol.
19 (FAC ¶ 31.) Second, Living Essentials contends Hansen’s promotion of its energy products for
20 use as intoxicants, while the products are labeled as “dietary supplements,” constitutes
21 misbranding.⁴ (FAC ¶ 33.)

22 ³Living Essentials specifically alleges violations of Sections 110445 (providing any added
23 poisonous or deleterious substance, or any food additive, pesticide chemical, preservative, or color
24 additive, shall be considered unsafe for use with respect to any food unless there is in effect a
25 regulation adopted that limits the quantity and the use, or intended use, of that substance), 110555
26 (providing any food is “adulterated” if it is, bears, or contains any food additive that is unsafe within
27 the meaning of Section 110445), and 109940 (defining “food additive” as “any substance, the intended
28 use of which results or may reasonably be expected to result, directly or indirectly, in the substance
 becoming a component of the food or otherwise affecting characteristics of the food.”).

22 ⁴Living Essentials specifically alleges violations of the following Sherman Law provisions
23 dealing with “misbranding”: Sections 110505 (adopting the FDCA definitions and standards of
24 identity, quality, and fill of container), 110665 (providing any food is “misbranded” if its nutrition
25 labeling does not conform to FDCA requirements), 110660 (providing that any food is misbranded
26 “if its labeling is false or misleading in any particular”), 110710 (providing any food is misbranded

1 This particular claim is not solely governed by an interpretation of the FDCA or FDA
 2 regulations, because there is no FDCA provision or regulation regarding the use of caffeinated
 3 drinks as mixers with alcohol. See Sandoz (plaintiff alleged an ingredient was “active” within the
 4 meaning of a potentially ambiguous FDA regulation). It is also not clear whether this is an issue
 5 the FDA has undertaken to or has the responsibility to resolve. See Summit I, 922 F. Supp. 299
 6 (holding plaintiff’s claims were precluded where plaintiff alleged defendant failed to disclose a
 7 “fact,” the truth of which was being reviewed and determined by the FDA). The FDA materials
 8 which Hansen has submitted state: “the FDA is focusing on the safety of products in which
 9 caffeine has been intentionally added to alcoholic beverages *by the manufacturer.*”⁵ Decl. of
 10 Edward J. McIntyre in Supp. of Pl.’s Mot. to Dismiss, Exhibit 3 (emphasis added). This suggests
 11 that the FDA is not primarily responsible for deciding whether it is safe for *consumers*, rather than
 12 manufacturers, to mix energy drinks with alcohol. Hansen itself states that the FDA has never
 13 regulated what consumers may do with food products once purchased. (Motion to Dismiss, 11:9-
 14 12:5.)

15 To the extent Living Essentials alleges specific false or misleading statements, this claim is
 16 not precluded merely because Living Essentials alleges violations the Sherman Law. Living
 17 Essentials alleges Hansen’s statements, which suggest mixing caffeinated beverages with alcohol
 18 is safe, are false and misleading. Nothing prohibits Living Essentials from relying on an FDA
 19 regulation “merely to establish the standard or duty which defendants allegedly failed to meet.”
 20 See Grove Fresh, 720 F. Supp. at 715-16. In addition, Living Essentials can establish the falsity of

21 if it is represented to be a food for which a definition and standard of identity has been established by
 22 Section 110505, but the label fails to bear the name of that food or fails to conform to the statutory
 23 definition and standard), 110745 (providing any food is misbranded if it is intended as a component
 24 of another food and when used in accordance with the directions of the purveyor, will result in the
 25 final food being adulterated or misbranded).

26 ⁵Hansen submits the FDA’s Q&As on Caffeine in Alcoholic Beverages, which states: “Q5:
 27 Will other caffeine-related products be next? A5: At this time, the FDA is focusing its attention on
 28 products in which caffeine has been intentionally added to alcoholic beverages by the manufacturers.
 Other products containing added caffeine may be subject to agency review if the available scientific
 data and information indicate that added caffeine may pose a safety concern, or is being unlawfully
 used, under the conditions of its use in other products. The manufacturer’s continuing responsibility
 includes marketing products with ingredients that are safe for their intended use, and are otherwise
 in compliance with the law.” Decl. of Edward J. McIntyre in Supp. of Pl.’s Mot. to Dismiss, Exhibit
 3.

- 1 Hansen's statements - i.e., that such use is not safe - by providing other evidence. For example,
- 2 Living Essentials alleges such use leads people to drink more and engage in dangerous activities,
- 3 which Living Essentials can prove without reference to the FDCA.

4 The Court finds that this claim is not precluded by the FDCA.

b. Alleged statements as to calorie and sugar content

6 Living Essentials claims Hansen's advertising and labels mislead consumers as to calorie
7 and sugar content. Many of Hansen's products are allegedly sold in 16-ounce cans, containing
8 two 8-ounce servings. (FAC ¶ 34.) Living Essentials alleges the "Supplemental Facts" on the
9 labels are deceptive because they are based on an 8-ounce serving, although the drinks are
10 promoted, designed to be, and customarily are consumed in one sitting. (FAC ¶¶ 34, 43.)
11 According to Living Essentials, the cans are designed to be consumed as a single serving because
12 the can is non-resealable, has no demarcation to indicate a half-way point, and the drink will lose
13 carbonation and the original taste if not consumed in one sitting. (FAC ¶¶ 38-40.) Living
14 Essentials alleges Hansen markets the products as single 16-ounce servings, pointing to the
15 following statements:

FAC ¶ 37: “experience a can . . . to achieve the benefits of 100 mg of EGCG”

FAC ¶ 35: “GO BIG”

FAC ¶ 36: “half the caffeine of regular coffee” but “Twice the buzz of a regular energy drink”

FAC ¶ 41: "It's definitely not soda but you can still down the whole 16-oz can"

Living Essentials alleges these statements are misleading because they “promise consumers that they will receive twice the buzz of a regular eight (8) ounce energy drink by consuming its sixteen (16) ounce can, or assuming the opposite, Hansen asserts that a single eight (8) ounce serving of Monster Energy or Lo Carb Monster is twice as effective as regular energy drinks.” (FAC ¶ 35.) Living Essentials further alleges “Hansen’s deceptive serving size, calorie, carbohydrate, and sugar listings violate state labeling laws.⁶ (FAC ¶ 33.)

27 ⁶Living Essentials specifically alleges violations of Sections 110290 (listing factors to be
28 considered in determining whether labeling or advertising is misleading), 110505 (adopting the FDCA
definitions and standards of identity, quality, and fill of container), 110665 (providing any food is
misbranded if its nutrition labeling does not conform to FDCA requirements), 110660 (providing that

1 The FDA has promulgated regulations regarding determining the proper serving size.⁷ To
2 the extent that Living Essentials argues that Hansen mislabeled its product as to the serving size -
3 i.e., that the proper serving size is 16-ounces, not 8-ounces - the Court agrees with Hansen that this
4 claim is a matter more properly resolved by the FDA. If the Court required Hansen to change its
5 labeling, it might force Hansen to violate the FDCA. See Braintree, 1997 WL 94237 at *7 (noting
6 the possibility of such a dilemma demands that classic misbranding claims be reserved solely for
7 resolution by the FDA). However, to the extent that Living Essentials argues that Hansen's
8 advertising misleads customers into thinking its products are twice as effective as competing
9 brands, when they are just twice as large, this claim is valid. The Court does not need to interpret
10 or apply FDCA provisions and regulations regarding serving size to determine the truth or falsity
11 of Hansen's statements.

12 Accordingly, the Court finds that this claim is not precluded by the FDCA, to the extent
13 that Living Essentials argues that Hansen’s advertising misleads customers into thinking its
14 products are twice as effective as competing brands, when they are just twice as large. But to the
15 extent that Living Essentials argues that Hansen mislabeled its product as to the serving size, the
16 Court finds the claim is precluded.

c. Alleged statements as to energizing effect

18 Living Essentials contends Hansen misleads consumers about the energizing effect of its
19 energy drinks by making the following false or misleading statements:

20 FAC ¶ 46: "It's a wicked mega hit that delivers twice the buzz of a regular energy drink." (Monster Energy)

21 FAC ¶ 47: "Lo-Carb Monster Energy still delivers twice the buzz of a regular
22 energy drink, but only has a fraction of the calories." (Lo Carb Monster)

any food is misbranded “if its labeling is false or misleading in any particular”), 110670 (providing any food is misbranded if its labeling does not conform with the FDCA requirements for nutrient content or health claims); 21 U.S.C. 343(a)) (providing a food is misbranded if its labeling “is false or misleading in any particular”).

²⁷Hansen cites to the following regulations: 12 C.F.R. § 101.9(b) (nutrition labeling of food, 101.12(b) (table 2) (reference amounts to be used as the basis for determining serving sizes for specific products), 101.9(b)(8)(i) (procedures for determining serving size), and 101.30(b)(1) (percentage juice declaration for beverages purportedly containing juice).

FAC ¶ 48: "Java Monster . . . half the caffeine of regular coffee. Twice the "Buzz." (Java Monster products)

FAC ¶ 49: “works, tastes, and mixes as good as the original, but with only 10 calories” and provides “the energy you need to party all night with just 10 calories.” (Lost Perfect Ten)

Living Essentials alleges these statements are “false and/or misleading based on the products’ ingredients and generally accepted principles of biochemistry, pharmacology and physiology.” (FAC ¶¶ 46-49.) Living Essentials further alleges these statements violate the Sherman Law.⁸

Neither party has cited to an FDCA provision or FDA regulation regarding “energy” or the efficacy of energy products.⁹ Because, to the best of the Court’s knowledge, the truth or falsity of Hansen’s advertising regarding the energizing effect of its products does not require interpretation and enforcement of the FDCA or its regulations, the Court finds that this claim is not precluded.

d. Alleged representation of energy products as dietary supplements

Living Essentials alleges Hansen misbrands its products because Hansen labels them dietary supplements and energy supplements, but promotes them as conventional foods (beverages) and mixers for alcohol (additives) in violation of the FDCA and Sherman Law.¹⁰ (FAC ¶¶ 52-55.) According to Living Essentials, under federal law, a dietary supplement cannot be represented to be a conventional food. (FAC ¶ 57.) Living Essentials alleges Hansen intends for consumers to ingest its products in lieu of coffee, tea, or alcoholic beverage mixers and by

⁸ Living Essentials specifically alleges violations of Sections 110390 (prohibiting dissemination of any false advertisement of any food, drug, device, or cosmetic, false meaning “false or misleading in any particular”) and 110290 (listing factors to be considered in determining whether labeling or advertising is misleading).

⁹Hansen argues but does not explain how adjudication of this claim would require interpretation of the FDCA provisions defining adulteration, misbranding, and the term “dietary supplement.”

¹⁰Living Essentials alleges violations of Section 343 of the FDCA (section on misbranding) and violations of the Sherman Law provisions dealing with misbranding: Sections 110100(a) (incorporating all federal food labeling regulations), 110655 (providing any food is “misbranded” if its nutrition labeling does not conform to FDCA requirements), 110710 (providing any food is misbranded if it is represented to be a food for which a definition and standard of identity has been established by Section 110505, but the label fails to bear the name of that food or fails to conform to the statutory definition and standard).

1 implication intends its own drinks to be considered coffee, tea, or alcoholic beverage mixers.
 2 (FAC ¶ 57.)

3 The Court agrees with Hansen that this claim is similar to the one in Braintree, where the
 4 plaintiff claimed defendant misbranded its product as a “dietary supplement” because defendant
 5 should have submitted its product to the FDA for approval as a drug. 1997 WL 94237 at *1. The
 6 court held that plaintiff’s Lanham Act claim would require the court to interpret and apply the
 7 FDCA definition of “dietary supplement.” Id. at *7.

8 Because this is a straightforward misbranding claim best resolved by the FDA, the Court
 9 finds this claim is precluded.

10 **5. Summary**

11 The Court finds Living Essentials’ claim that Hansen’s statements mislead as to calorie and
 12 sugar content is precluded to the extent that Living Essentials argues that Hansen mislabeled its
 13 product as to the serving size,. The Court also finds that the claim that Hansen misbrands its
 14 products as dietary supplements is precluded. The remaining claims are not precluded.

15 **B. Preemption of State Law Causes of Action by the FDCA**

16 Hansen argues that Living Essentials’ state law claims are expressly and impliedly
 17 preempted by the FDCA. Living Essentials’ state law causes of action are for unfair competition
 18 in violation of California Business and Professions Code § 17200 and false advertising in violation
 19 of § 17500. Section 17200 prohibits “any unlawful, unfair or fraudulent business act or practice.”
 20 Cal. Bus. & Prof. Code § 17200 (2009). By proscribing “unlawful” acts or practices, “Section
 21 17200 ‘borrows’ violations of other laws and treats them as unlawful practices independently
 22 actionable.” Cel-Tech Commc’ns, Inc. v. Los Angeles Cellular Tel. Co., 83 Cal. Rptr. 2d 548, 561
 23 (Cal. 1999). Section 17500 makes it unlawful for anyone to use false or deceptive marketing
 24 practices. See Webster v. Omnitrition Intern., Inc., 79 F.3d 776, 788 (9th Cir. 1996).

25 Living Essentials predicates the Section 17200 unlawful competition claim on alleged
 26 violations of the Sherman Law.¹¹ (FAC ¶ 68.)

27
 28 ¹¹Living Essentials specifically alleges violations of Section 110100(a) (adopting all federal
 food labeling regulations); 110445 (unsafe food additives); 109940 (defining food additive); 110555
 (defining adulteration); 110660 (defining misbranding); 110655 (defining adulteration of food intended

1 1. Relevant Legal Principles, Statutory Provisions, and Caselaw2 a. General Principles of Preemption

3 “A fundamental principle of the Constitution is that Congress has the power to preempt
 4 state law.” Crosby v. Nat’l Foreign Trade Council, 530 U.S. 363, 372 (2000). United States
 5 Supreme Court precedent establishes three situations in which state law is preempted. Congress
 6 may preempt state law with an express provision for preemption, or Congress may implicitly
 7 preempt state law by field preemption¹² or conflict preemption. Id. at 372-73. As to conflict
 8 preemption, “state law is naturally preempted to the extent of any conflict with a federal statute.”
 9 Thus, state law is preempted “where it is impossible for a private party to comply with both state
 10 and federal law . . . and where ‘under the circumstances of [a] particular case, [the challenged state
 11 law] stands as an obstacle to the accomplishment and execution of the full purposes and objectives
 12 of Congress.’” Id. (internal citation omitted).

13 “In all pre-emption cases, and particularly in those in which Congress has ‘legislated . . . in
 14 a field which the States have traditionally occupied,’ we ‘start with the assumption that the historic
 15 police powers of the States were not to be superseded by the Federal Act unless that was the clear
 16 and manifest purpose of Congress.’” Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996). Laws
 17 regulating the proper marketing of food, including the prevention of deceptive sales practices, are
 18 within the states’ historic police powers and thus subject to the presumption against preemption.
 19 In re Farm Raised Salmon Cases, 72 Cal. Rptr. 3d 112 (2008) (citing Florida Lime & Avocado
 20 Growers v. Paul, 373 U.S. 132, 144 (1963) and Bronco Wine Co. v. Jolly, 17 Cal. Rptr. 3d 180
 21 (Cal. 2004)).

22 b. FDCA’s Preemption Provision

23 Congress added an express preemption provision to the FDCA when it enacted the
 24 Nutrition Labeling and Education Act of 1990 (“NLEA”). Pub. L. No. 101-535, § 6(a), 104 Stat.

25 for export); 110710 (stating that food is misbranded if it does not conform with § 110505); 110745
 26 (defining misbranding of foods used as a component of other foods).

27 Like the FDCA, there is no private cause of action to directly enforce the Sherman Law.
 28 Jackson v. Balanced Health Prods., Inc., 2009 WL 1625944, at *6 (N.D. Cal. June 10, 2009) (citing
Summit I, 922 F. Supp. at 317).

¹²Hansen does not argue field preemption.

1 2353 (1990). Section 343-1(a) of the FDCA preempts state laws which are “not identical to” the
2 FDCA requirements enumerated in the preemption provision.¹³ 21 U.S.C. § 343-1(a). These
3 enumerated requirements are for the most part found in Section 343, the section on misbranded
4 food.

5 The NLEA also contains an uncodified express savings clause: “The [NLEA] shall not be
6 construed to preempt any provision of State law, unless such provision is expressly preempted
7 under [§ 343-1(a)].” Wright v. Gen. Mills, Inc. 2009 WL 3247148, at *2 (S.D. Cal. 2009) (citing
8 Pub. L. No. 101-535, § 6(c)(1)).

c. In re Farm Raised Salmon Cases

10 In In re Farm Raised Salmon Cases, the California Supreme Court addressed the precise
11 issue in this case - whether state law claims based on the Sherman Law were impliedly preempted
12 by the FDCA. 72 Cal. Rptr. 3d 112 (2008). In Farm Raised, the plaintiffs alleged defendants sold
13 artificially colored farmed salmon without disclosing to consumers the use of color additives. Id.
14 at 115. Plaintiffs sued under Sections 17200 and 17500, and predicated the 17200 claim on

¹⁷ 21 U.S.C. § 343-1(a) states in full: Except as provided in subsection (b) of this section, no
18 State or political subdivision of a State may directly or indirectly establish under any authority or
continue in effect as to any food in interstate commerce--
19 (1) any requirement for a food which is the subject of a standard of identity established under section
341 of this title that is not identical to such standard of identity or that is not identical to the
requirement of section 343(g) of this title, except that this paragraph does not apply to a standard of
20 identity of a State or political subdivision of a State for maple syrup that is of the type required by
sections 341 and 343(g) of this title,
21 (2) any requirement for the labeling of food of the type required by section 343(c), 343(e), 343(i)(2),
343(w), or 343(x) of this title that is not identical to the requirement of such section, except that this
22 paragraph does not apply to a requirement of a State or political subdivision of a State that is of the
type required by section 343(c) of this title and that is applicable to maple syrup,
23 (3) any requirement for the labeling of food of the type required by section 343(b), 343(d), 343(f),
343(h), 343(i)(1), or 343(k) of this title that is not identical to the requirement of such section, except
24 that this paragraph does not apply to a requirement of a State or political subdivision of a State that
is of the type required by section 343(h)(1) of this title and that is applicable to maple syrup,
25 (4) any requirement for nutrition labeling of food that is not identical to the requirement of section
343(q) of this title, except a requirement for nutrition labeling of food which is exempt under
26 subclause (i) or (ii) of section 343(q)(5)(A) of this title, or
27 (5) any requirement respecting any claim of the type described in section 343(r)(1) of this title, made
in the label or labeling of food that is not identical to the requirement of section 343(r) of this title,
28 except a requirement respecting a claim made in the label or labeling of food which is exempt under
section 343(r)(5)(B) of this title.”

1 violation of the Sherman Law, which contains a provision on artificial coloring identical to the
 2 FDA regulation on artificial coloring. Id. at 116, 118-19.

3 The court interpreted Section 343-1 to mean that states could adopt state laws “identical
 4 to” the FDCA and its regulations, and that nothing in the text of Section 343-1 or the legislative
 5 history suggested Congress intended to preempt private actions predicated on identical state
 6 requirements. Id. at 1121-25.

7 The court looked to the statutory language and legislative history. First, the court found
 8 that the fact that Congress was silent when passing the NLEA on the issue of who would be
 9 allowed to enforce the identical state requirements, suggested that “Congress did not intend to alter
 10 the status quo, i.e., states may choose to permit their residents to file unfair competition or other
 11 claims based on the violation of state laws.” Id. at 122. Second, the various specific express
 12 preemption provisions in the FDCA, such as the preemption provision for medical devices, clearly
 13 demonstrated that “Congress knows how to write a preemption clause when it wants to.” Id. at
 14 123. Third, the uncodified savings clause was further evidence that Congress intended “that the
 15 preemptive scope of section 343-1 was to sweep no further than the plain language of the statute
 16 itself.” Id. at 122.

17 The court also relied on two United States Supreme Court cases, Medtronic, Inc. v. Lohr
 18 and Bates v. Dow Agrosciences LLC, in which the Supreme Court construed preemption
 19 provisions similar to Section 343-1 and held that private suits to enforce state laws identical to
 20 federal laws were not preempted.¹⁴ Id. at 124-25 (citing Medtronic, 518 U.S. 470, 492 (1996);
 21 Bates, 544 U.S. 431, 452 (2005)). The Supreme Court further held in these two cases that the
 22 preemption provisions did not preclude state remedies for violations of identical state rules. Farm
 23 Raised, 72 Cal. Rptr. 3d at 124-25 (citing 518 U.S. at 495; 544 U.S. at 448). In fact, the court in
 24
 25

26 ¹⁴The preemption provision at issue in Medtronic, the Medical Device Amendments, provided:
 27 “[N]o State . . . may establish . . . with respect to a device . . . any [state] requirement . . . which is
 28 different from, or in addition to, any [federal] requirement” 21 U.S.C. § 360k(a) 503. The
 preemption provision at issue in Bates, the Federal Insecticide, Fungicide, and Rodenticide Act,
 provided: “State[s] shall not impose or continue in effect any requirements for labeling or packaging
 in addition to or different from those required under this subchapter.” 7 U.S.C. § 136v(b).

1 Farm Raised noted that no court had ever held that state remedies for violation of identical state
2 laws were precluded. Farm Raised, 72 Cal. Rptr. 3d at 127.

3 The court further reasoned that the standing provision in Section 337 did not change the
4 outcome: “The statute, by its very terms, only implicates efforts to enforce *federal* law. What
5 section 337 does *not* do is limit, prohibit, or affect private claims predicated on *state* laws.” *Id.* at
6 128 (emphasis in original). The court reasoned that the plaintiffs in Farm Raised were not
7 attempting to enforce the FDCA, because the plaintiffs’ claims were predicated on the Sherman
8 Law, not on the FDCA. *Id.*

Finally, the court concluded that the FDCA did not impliedly preempt “identical” state laws such as the Sherman Law:

[W]hile allowing private remedies based on violations of state laws identical to the FDCA may arguably result in actions that the FDA itself might not have pursued, Congress appears to have made a conscious choice not to preclude such actions. Defendants' assertion that Congress intended, without so saying, to limit states long-standing ability to allow private remedies for violations of their own laws has no support in either statutory language, legislative history, or case law—and therefore defendants have not overcome the strong presumption against preemption applicable here, as is their burden.

Id. at 128-29.

d. Federal Caselaw

Few district court cases have addressed this issue. Hansen relies on a case prior to Farm Raised, Fraker v. KFC Corp., 2007 WL 1296571 (S.D. Cal. April 30, 2007).¹⁵ In Fraker, the district court held plaintiffs' Sections 17200 and 17500 claims based on alleged violations of the FDCA and Sherman Law were impliedly preempted. Id. at *2. The court held that "to the extent Plaintiff contends that alleged violations of the FDCA and Sherman Law give rise to viable state law claims, such claims are impliedly preempted by the FDCA." Id. at *4.

On the other hand, Living Essentials points to another case prior to Farm Raised, Vermont Pure Holdings, Ltd v. Nestle Waters North America, Inc., in which the district court came to a similar conclusion as the California Supreme Court. 2006 WL 839486 (D. Mass. Mar. 28, 2006).

²⁷ Hansen also cites to a footnote in Summit II stating that “a Plaintiff may not bring a § 17200
claim that is, in fact, an attempt to state a claim under the federal FDCA.” Summit II, 933 F. Supp.
at 943 n.21. However, Living Essentials’ claim does not attempt to state a claim under the FDCA;
rather, Living Essentials alleges violations of *state* law.

1 In Vermont Pure, plaintiff sued under several state unfair competition statutes, alleging Nestle
 2 made false and misleading statements regarding the source, nature, and purity of its bottled water.
 3 Id. at *6-7. Each of these states had enacted laws adopting the FDA definition of “spring water.”
 4 Id. at *6 n.5.

5 First, the court held that “to the extent the state laws under which Vermont Pure brings suit
 6 have adopted, by recitation or reference, the FDA’s definition of “spring water,” they are not
 7 expressly preempted by 343-1.” Id. at *6. The court’s reasoning was similar to the California
 8 Supreme Court’s in Farm Raised:

9 [Section 337], however, relate[s] only to enforcement of the FDCA. *Vermont Pure’s*
 10 “spring water” claims arise purely from state law. To be sure, the state laws are
 11 based on federal regulations, as the FDCA requires them to be, but Section 337 is
 12 silent as to these state law suits. This reading makes sense not only in terms of the
 13 plain language of § 337, but in light of the legislative history and the agency’s
 14 interpretive history of § 343-1, see *infra*.

15 Id. at *6 n.3 (emphasis added). Second, the court examined the legislative history and FDA’s
 16 interpretive history and held that the state law claims were not impliedly preempted: “Congress
 17 and the FDA appear to have made a conscious choice to allow the several states to regulate bottled
 18 water so long as the state standards employed are identical to those adopted by the FDA.” Id. at
 19 *6-7. The court reasoned: “The requirement of identity promotes uniformity in that courts in
 20 every state look to the same standard. Permitting states to interpret FDA definitions also allows
 21 for additional resources to be brought to bear in the enforcement of national standards upon
 22 regional and local markets.” Id.

23 Living Essentials also relies on Jackson v. Balanced Health Products, Inc., 2009 WL
 24 1625944 (N.D. Cal. June 10, 2009), which was decided after Farm Raised. In Jackson, plaintiffs
 25 sued under Sections 17200 and 17500 and other state law causes of action for defendant’s
 26 allegedly false representations that a diet pill was “all natural” although it contained a prescription
 27 strength diuretic. Id. at *1-2. The claims were based on violations of the Sherman Law. Id. at *4.
 28 The court held the defendants’ actions gave rise to valid state law claims, and that simply alleging
 the diet pill contained a prescription drug did not invoke federal preemption. Id.

2. Analysis

1 Hansen argues Section 343-1 expressly preempted the Sherman Law provisions that Living
 2 Essentials relies on. Additionally, although the phrase “implied preemption” is not used, it
 3 appears Hansen also argues that the FDCA standing provision in Section 337 impliedly preempts
 4 state law claims based on Sherman Law provisions “identical to” the FDCA. Hansen explicitly
 5 states it is not arguing field preemption. Presumably then, Hansen is arguing implied conflict
 6 preemption.

7 a. Express Preemption

8 First, the Court looks to the “plain wording” of the FDA’s express preemption provision to
 9 identify the “domain expressly preempted” by the language of the statute. See Spiertsma v.
 10 Mercury Marine, 537 U.S. 51, 62-63 (2002); see also Vermont Pure, 2006 WL 839486 at *6
 11 (“[T]he analysis for express preemption turns not on whether a claim requires direct interpretation
 12 and application of FDA regulations . . . but on the identity of state and federal regulations.”).
 13 Section 343-1 provides that “no State or political subdivision of a State may directly or indirectly
 14 establish under any authority or continue in effect as to any food in interstate commerce” any
 15 requirements which are “not identical to” the federal requirements enumerated in Section 343-1.¹⁶
 16 FDA regulations define the term “not identical to”:

17 “Not identical to” does not refer to the specific words in the requirement but instead
 18 means that the State requirement directly or indirectly imposes obligations or
 19 contains provisions concerning the composition or labeling of food, or concerning
 20 a food container, that: (i) Are not imposed by or contained in the applicable
 21 provision [or regulation] . . . ; or (ii) Differ from those specifically imposed by or
 22 contained in the applicable provision [or regulation]

23 C.F.R. § 100.1(c)(4); see also Pom Wonderful LLC v. Ocean Spray Cranberries, Inc., 642 F.
 24 Supp. 2d 1112, 1121 (C.D. Cal. 2009) (citing this regulation and holding that “so long as
 25 Plaintiff’s state law claims do not impose *different requirements* than the FFDCA or FDA
 26 regulations, these claims are not preempted”) (emphasis added).

27 The Sherman Law adopts and incorporates by reference the federal requirements relating to
 28 (1) food labeling regulations, (2) definitions and standards of identity, quality, and fill of

¹⁶See supra n.13 (full text of Section 343-1).

1 container, and (3) requirements for nutrient content or health claims.¹⁷ Thus, the Sherman Law
2 provisions dealing with these subjects do not impose different requirements than the FDA
3 requirements, and are therefore not preempted.¹⁸ As to the remaining Sherman Law provisions
4 that Living Essentials relies upon which Living Essentials concedes are *not* “identical to” federal
5 requirements,¹⁹ Hansen does not provide any support for its contention that these provisions fall
6 within the preemptive scope of Section 343-1

7 Because Hansen has not met its burden of demonstrating that Section 343-1 expressly
8 preempts these provisions, the Court finds that the Sherman Law provisions relied on by Living
9 Essentials are not expressly preempted.

b. Implied Preemption

11 Hansen argues that Living Essentials' state law claims are impliedly preempted because
12 allowing private parties to enforce state statutes identical to the FDCA would frustrate Congress'
13 intent that there be no private cause of action to enforce the FDCA. Hansen contends that the
14 holding in Farm Raised - that state law claims predicated on provisions of the Sherman Law which
15 are identical to the FDCA are not impliedly preempted - is not binding on this Court, and
16 moreover, was wrongly decided.

17 While it is true that this court is not bound by Farm Raised, the California Supreme Court's
18 analysis of the statutory language, legislative history, and federal caselaw is thorough, and the
19 Court finds its reasoning persuasive. The Farm Raised court relied on Medtronic and Bates, cases
20 in which the United States Supreme Court construed preemption provisions similar to Section 343-
21 1 and held that private suits to enforce state laws identical to federal laws were not preempted. In

¹⁷Cal. Health & Safety Code §§ 110100(a), 110505, 110670.

¹⁸Hansen provides no support for its arguments that “wholesale incorporation by reference” does not make the Sherman Law provisions “identical to” the applicable federal requirements and that the state law claims would “clearly impose different requirements.”

26 ¹⁹Living Essentials claims the following sections fall outside the preemption provision: 109940
27 (defining food additive); 110290 (misleading nature of food advertisement); 110390 (misleading
28 advertisements of any food); 110398 (advertisement of unadulterated or misbranded food); 110445
(unsafe food additives); 110555 (defining adulteration); 110655 (defining adulteration of food
intended for export); 110660 (defining misbranding); 110710 (stating that food is misbranded if it does
not conform with § 110505); 110745 (defining misbranding of foods used as a component of other
foods).

1 addition, the district courts in Vermont Pure and Jackson held that state law claims based on
 2 violations of state laws explicitly authorized by section 343-1 were not impliedly preempted.

3 Fraker does not change this result. First, unlike Fraker, Living Essentials brings claims
 4 based solely on the Sherman Law, not the FDCA. See Jackson v. Balanced Health Prods., 2009
 5 WL 1625944 (N.D. Cal. June 10, 2009) (distinguishing Fraker on the ground that the plaintiff in
 6 Fraker brought claims directly based on the FDCA); Farm Raised, 72 Cal. Rptr. 3d 112 (2008)
 7 (same); McKinniss v. Gen. Mills, Inc., 2007 WL 4762172, at *2 n.3 (C.D. Cal. Sep 18, 2007)
 8 (same). Second, the court in Fraker did not consider Section 343-1, the express preemption
 9 provision, in its implied preemption analysis. See Lockwood v. Conagra Foods, Inc., 597 F. Supp.
 10 2d 1028,1034 (N.D. Cal. Feb. 3, 2009) (declining to follow Fraker for this reason); see also Farm
 11 Raised, 72 Cal. Rptr. 3d at 123 (citing Freightliner Corp. v. Myrick, 514 U.S. 280, 288 (1995))
 12 (“[A]n express definition of the pre-emptive reach of a statute ‘implies’ - i.e., supports a
 13 reasonable inference - that Congress did not intend to pre-empt other matters . . .”). Finally,
 14 Fraker was decided before Farm Raised and therefore the district court did not have the benefit of
 15 considering the California Supreme Court’s reasoning in Farm Raised.

16 As the statutory language, legislative history, and federal caselaw suggests, Congress
 17 appears to have made a conscious choice not to preempt private actions predicated on violations of
 18 state requirements which are “identical to” FDCA requirements. Accordingly, the Court finds that
 19 the Sherman Law provisions that Living Essentials’ state law claims rely upon are not expressly or
 20 impliedly preempted.

21 **C. Standing Under the Lanham Act**

22 Hansen argues that Living Essentials fails to adequately plead Lanham Act standing. In
 23 the Ninth Circuit, in order to establish standing under the Lanham Act’s “false advertising” prong,
 24 a party must allege: “(1) a commercial injury based upon a misrepresentation about a product; and
 25 (2) that the injury is “competitive,” or harmful to the plaintiff’s ability to compete with the
 26 defendant.” Jack Russell Terrier Network of N. Cal. v. Am. Kennel Club, Inc., 407 F.3d 1027,
 27 1037 (9th Cir. 2005) (citing Barrus v. Sylvania, 55 F.3d 468, 470 (9th Cir. 1995)). Hansen
 28

1 contends Living Essentials fails to adequately plead the “competitive” injury prong.²⁰

2 Courts have held that a plaintiff sufficiently alleges “competitive injury” where the plaintiff
 3 alleges the defendant’s false or misleading statements tend to divert business from the plaintiff to
 4 defendant. See, e.g., Coastal Abstract Serv., Inc. v. First Am. Title Ins. Co., 173 F.3d 725, 734 (9th
 5 Cir. 1999) (finding that plaintiff’s injury was competitive, where the defendant sought by his
 6 statements to divert business from plaintiff to his employer); Nat’l Servs. Group, Inc. v. Painting
 7 & Decorating Contractors of Am., Inc., 2006 WL 2035465, at *3-4 (C.D. Cal. July 18, 2006)
 8 (noting the Ninth Circuit has focused on whether the statements in issue tended to divert business
 9 from the plaintiff to the defendant); Kournikova v. Gen. Media Commc’ns Inc., 278 F. Supp. 2d
 10 1111, 1117-18 (C.D. Cal. 2003) (“[I]f one participant in the marketplace makes false statements
 11 that could theoretically draw consumers away from similar offerings of other participants in the
 12 same marketplace, and those false statements implicate the purposes of the Lanham Act . . . then
 13 those other participants have standing . . .”) (citing Waits v. Frito-Lay, 978 F.2d 1093 (9th Cir.
 14 1992)).

15 Here, it is undisputed that Hansen and Living Essentials are direct competitors in the
 16 energy product business. Living Essentials alleges Hansen’s energy drinks compete with Living
 17 Essentials’ two-ounce liquid energy product in the marketplace throughout the United States.
 18 (FAC ¶¶ 8-12.) Living Essentials alleges Hansen’s false or misleading statements “are material;
 19 they are likely to influence the purchasing decision of a substantial number of reasonable
 20 consumers; those misrepresentations actually deceive or, at a minimum, have the tendency to
 21 deceive a substantial segment of the reasonable consumer audience; and, Living Essentials has
 22 been injured, and in the future is likely to continue to be injured, as a result of the
 23 misrepresentations, *both by the direct diversion of sales from Living Essentials to Hansen and by a*
 24 *lessening of the goodwill associated with Living Essentials’ products.*” (FAC ¶ 63.) (emphasis
 25 added).

26
 27 ²⁰Hansen argues in its reply brief that Living Essentials’ CEO admitted in a deposition that
 28 Living Essentials does not compete in the market for energy drinks sold in conjunction with alcohol;
 therefore, Living Essentials has not suffered a competitive injury. Because the deposition is not a
 matter properly subject to judicial notice, the Court need not address this argument.

1 Living Essentials has sufficiently pleaded that Hansen's allegedly false and misleading
 2 statements tends to divert sales from Living Essentials' competing energy product. Accordingly,
 3 the Court denies Hansen's motion to dismiss the first cause of action for lack of standing.

4 **D. Standing Under the California Business and Professions Code**

5 Hansen argues Living Essentials fails to adequately plead standing under Sections 17200
 6 and 17500. Proposition 64 amended the California Business and Professions Code to provide that
 7 an action under these sections may be brought "by a person who has suffered injury in fact and has
 8 lost money or property as a result." Cal. Bus. & Prof. Code §§ 17204, 17535; see also Branick v.
9 Downey Sav. & Loan Ass'n, 138 P.3d 214, 217 (Cal. 2006).

10 A plaintiff suffers "injury in fact" for the purposes of standing under Sections 17200 and
 11 17500 when he or she has: (1) expended money due to the defendant's acts of unfair competition,
 12 (2) lost money or property, or (3) been denied money to which he or she has a cognizable claim.
 13 Hall v. Time Inc., 70 Cal. Rptr.3d 466, 470-71 (Ct. App. 2008). The phrase "lost money or
 14 property as a result" imposes a causation requirement. Id. at 471. "A plaintiff alleging unfair
 15 business practices under [Section 17200] must state with reasonable particularity the facts
 16 supporting the statutory elements of the violation." Khoury v. Maly's of Cal., Inc., 17 Cal. Rptr.
 17 2d 708 (Ct. App. 1993).

18 Living Essentials has sufficiently pleaded it lost money or property and that this loss was
 19 caused by Hansen's allegedly false or misleading advertising and labeling. Living Essentials
 20 alleges Hansen's energy drinks compete with Living Essentials' two-ounce energy product in the
 21 marketplace throughout the United States. (FAC ¶¶ 8-12.) Living Essentials contends "it has
 22 suffered injury and harm and will continue to suffer injury and harm both by the direct diversion of
 23 sales from Living Essentials to Hansen and by a lessening of the goodwill associated with Living
 24 Essentials' products." (FAC ¶ 70.) According to Living Essentials, Hansen's false advertising of
 25 its energy drinks has caused Living Essentials to suffer "substantial economic damages." (FAC ¶
 26 13.)

27 Accordingly, the Court denies Hansen's motion to dismiss the second cause of action for
 28 lack of standing.

1 **E. Rule 9(b) Particularity Requirement**

2 Hansen argues that Living Essentials' entire counterclaim should be dismissed because it
 3 sounds in fraud and fails to meet the requirement of Rule 9(b) of the Federal Rules of Civil
 4 Procedure that allegations of fraud be stated with particularity.

5 When a plaintiff alleges "a unified course of fraudulent conduct" and relies entirely on that
 6 course of conduct as the basis of a claim, the claim is said to "sound in fraud," and the pleading of
 7 that claim as a whole must satisfy the particularity requirement of Rule 9(b). Vess v. Ciba-Geigy
 8 Corp. USA, 317 F.3d 1097, 1103-04 (9th Cir. 2003). Rule 9(b) requires plaintiff to allege
 9 circumstances constituting the alleged fraud that are "specific enough to give defendants notice of
 10 the particular misconduct . . . so that they can defend against the charge and not just deny that they
 11 have done anything wrong." Id. at 1106 (quoting Bly-Magee v. California, 236 F.3d 1014, 1019
 12 (9th Cir. 2001)). Plaintiff must allege "the who, what, when, where, and how" of the misconduct
 13 charged. Vess, 317 F.3d at 1106. "[A] plaintiff must set forth more than the neutral facts
 14 necessary to identify the transaction. The plaintiff must set forth what is false or misleading about
 15 a statement, and why it is false." Id. (quoting Decker v. GlenFed, Inc. (In re GlenFed, Inc. Sec.
 16 Litig.), 42 F.3d 1541, 1548 (9th Cir. 1994)).

17 On the other hand, under Ninth Circuit precedent, where fraud is not an essential element
 18 of a claim, only allegations ("averments") of fraudulent conduct must satisfy the heightened
 19 pleading requirements of Rule 9(b). Vess, 317 F.3d at 1105. The court should "disregard"
 20 particular averments of fraud that are insufficiently pled, and then examine the remaining
 21 allegations to determine whether they state a claim. Id. Even if the word "fraud" is not used,
 22 fraud can be averred by "alleging facts that necessarily constitute fraud." Id. Under California
 23 law, the "indispensable elements of a fraud claim include a false representation, knowledge of its
 24 falsity, intent to defraud, justifiable reliance, and damages." Id.

25 Here, Living Essentials counterclaim does not "sound in fraud" because Living Essentials
 26 does not specifically allege fraud, fraud is not an essential element of the counterclaim, and Living
 27 Essentials does not allege "a unified course of fraudulent conduct" and rely entirely on that course
 28 of conduct as the basis of the claim. This case is unlike other cases in which courts have construed

1 a plaintiff's claims as alleging a "a unified course of conduct." See Pom Wonderful LLC v. Ocean
 2 Spray Cranberries, Inc., 642 F. Supp. 2d 1112, 1124 (C.D. Cal. 2009) (holding that plaintiff's false
 3 advertising claims were grounded in fraud where all plaintiff's allegations dealt with the same
 4 underlying issue - the defendant's intent to mislead consumers by mischaracterizing the primary
 5 ingredients of their beverage); CollegeNet, Inc. v. Xap Corp., 2004 WL 2303506, at *4 (D.Or. Oct.
 6 12, 2004) (holding that plaintiff alleged a unified course of fraudulent conduct where "[a] fair
 7 reading of these allegations shows that plaintiff accuses defendant of knowingly and intentionally
 8 engaging in a pattern or practice of misleading and deceiving colleges and universities about
 9 defendant's handling of confidential student data in an attempt to obtain institutional customers").
 10 In those cases, plaintiffs alleged the defendants' statements were misleading as to one underlying
 11 factual issue. Here, Living Essentials' allegations deal with four categories of allegedly false or
 12 misleading representations, all relating to different underlying factual issues (*supra*, Section A).
 13 Therefore, Living Essentials' counterclaim does not "sound in fraud," and Rule 9(b)'s heightened
 14 pleading requirement does not apply to the entire counterclaim.

15 The only allegations that can be construed as fraud-based are Living Essentials' allegations
 16 that Hansen "knew or should have known" its representations as to the energizing effect of its
 17 energy drinks were false. (FAC ¶¶ 46-49.) These allegations relate only to the claim that
 18 Hansen's statements mislead as to energizing effect. The issue is whether these allegations of
 19 fraudulent conduct are adequately pleaded. The Court finds that they are. Living Essentials
 20 alleges Hansen made false or misleading statements, alleges the specific content of the statements,
 21 and alleges on what product the statement can be found:

22 FAC ¶ 46: "It's a wicked mega hit that delivers twice the buzz of a regular energy
 23 drink." (Monster Energy)

24 FAC ¶ 47: "Lo-Carb Monster Energy still delivers twice the buzz of a regular
 25 energy drink, but only has a fraction of the calories." (Lo Carb Monster)

26 FAC ¶ 48: "Java Monster . . . half the caffeine of regular coffee. Twice the
 27 "Buzz." (Java Monster products)

28 FAC ¶ 49: "works, tastes, and mixes as good as the original, but with only 10
 29 calories" and provides "the energy you need to party all night with just 10
 30 calories." (Lost Perfect Ten)

Living Essentials alleges each statement is false and/or misleading based on the products'

1 ingredients and “generally accepted principles of biochemistry, pharmacology and physiology.”
 2 (FAC ¶¶ 46-48). These allegations are specific enough to give Hansen notice of why Living
 3 Essentials believes each statement are false.

4 Accordingly, the Court denies Hansen’s motion to dismiss the counterclaim for failure to
 5 meet Rule 9(b)’s particularity requirement.

6 **F. Non-Actionable Puffery**

7 Hansen argues that the allegedly false and misleading statements are “puffery” and not
 8 actionable under the Lanham Act, particularly statements that Hansen’s drinks provide “twice the
 9 buzz” and allow a user to “party all night.” Hansen argues that each phrase depends on
 10 consumers’ subjective opinions and cannot be scientifically quantified either to prove or disprove
 11 the statement. Because Hansen raises this issue for the first time in its reply brief, Living
 12 Essentials has not had an opportunity to respond, but in any event, the Court rejects Hansen’s
 13 argument.

14 Puffery is defined as “involving outrageous generalized statements, not making specific
 15 claims, that are so exaggerated as to preclude reliance by consumers.” Cook, Perkiss and Liehe,
 16 Inc. v. N. Cal. Collection Serv. Inc., 911 F.2d 242, 246 (9th Cir. 1990). “[A]dvertising which
 17 merely states in general terms that one product is superior is not actionable.” Id. (quoting Smith-
 18 Victor Corp. v. Sylvania Elec. Prods, Inc., 242 F. Supp. 302, 308 (N.D. Ill. 1965)). On the other
 19 hand, specific and measurable advertisement claims of product superiority based on testing are
 20 actionable. Southland Sod Farms v. Stover Seed Co., 108 F.3d 1134 (9th Cir. 1997).
 21 Additionally, “misdescriptions of specific or absolute characteristics of a product are actionable.”
 22 Cook, 911 F.2d at 246.

23 At this point in the proceedings, the Court declines to determine whether the statements
 24 constitute puffery, because it is a question of fact whether the level of “buzz” or energy can be
 25 scientifically quantified or whether it is a subjective feeling. Accordingly, the Court denies the
 26 motion to dismiss.

27 **CONCLUSION**

28 The Court GRANTS the motion to dismiss as to the Lanham Act cause of action to the

1 extent that Living Essentials counterclaim is based on the arguments that (1) Hansen mislabels its
2 products as to the serving size and (2) misbrands its products as dietary supplements. The Court
3 DENIES the motion to dismiss as to the remaining claims.

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5 **IT IS SO ORDERED.**

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7 **DATED: December 22, 2009**

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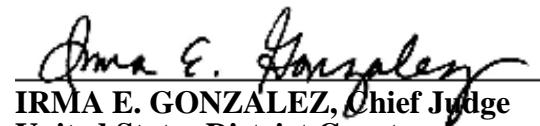
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IRMA E. GONZALEZ, Chief Judge
United States District Court